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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-520

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA,
Petitioner,

vs.

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by the original defendants, et al.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONER

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The argument of Respondent Metropolitan School District of Perry Township ("Perry") and Respondents Bowen, Sendak, Negley and Indiana State Board of Education ("State") that the petition herein should be denied because Petitioner did not specifically argue in the Court of Appeals the precise questions presented in the petition, is unsound and inapplicable in the present case for the following reasons.

I. Specific limitations on the jurisdiction and powers of the federal courts may be noticed and raised at any time.

The proposition that limitations on the jurisdiction of the lower courts to consider and decide the merits of the issues presented to them may be raised and will be passed upon by the Supreme Court, even if such questions were not presented to or passed upon by the lower courts, is well established in the jurisprudence of this Court. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934); *Gutierrez v. Waterman S. S. Corp.*, 373 U.S. 206, 209 (1963). Application of this rule is not limited to cases where the trial court lacked jurisdiction over the subject matter. For example, in *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467 (1945), this Court ordered dismissal of a suit for refund of state taxes alleged to have been exacted in violation of the Commerce Clause. The Court held that the state statute providing for refund suits gave consent to suit only in the state courts and did not constitute a waiver of Eleventh Amendment immunity, although such question was raised by the state for the first time in this Court. In *McGrath v. Kristensen*, 340 U.S. 162, 167 (1950), the issue of justiciability under Article III of the Constitution was considered and passed upon for the first time in this Court. And in *Neely v. Eby Construction Co.*, 386 U.S. 317, 320-321 (1967), a case relied on by the State, this Court granted certiorari to consider whether the Court of Appeals had the authority, under Rule 50(d) of the Federal Rules of Civil Procedure, to order a complaint dismissed upon its determination that a jury verdict for plaintiff should have been set aside for insufficiency of the evidence, although the petitioner had argued in the Court of Appeals only that the evidence was sufficient to support the verdict and had not filed a petition for rehearing.

The Equal Educational Opportunities Act of 1974 in 20 U.S.C. § 1713, § 1755 and § 1758 limits the jurisdiction and powers of a federal court in entering a remedial decree after a finding of *de jure* segregation in schools by requiring certain findings with respect to alternative remedies, as well as deferral to local school officials and community leaders for a reasonable opportunity to develop a remedial plan, before the Court is permitted to enter a decree requiring involuntary transportation of students. In the present case the District Court ignored these limitations on its powers and jurisdiction, as well as the consistent holdings of this Court in school desegregation cases that the first responsibility to provide a remedy for unlawful school desegregation rests upon local school officials. *Brown v. Board of Education (Brown II)*, 349 U.S. 294, 299 (1955).

In *Mahler v. Eby*, 264 U.S. 32 (1924), the Court emphasized that such a statutory requirement that certain findings be made or procedures followed as a precondition to a challenged action is a jurisdictional limitation which will be considered for the first time in the Supreme Court. The Court granted habeas corpus to aliens ordered deported because the deportation warrant failed to include a specific finding that the petitioners were "undesirable residents" as required by statute, although the petitioners had been convicted of certain crimes which could have been a ground for such a finding. Since such finding was "made a condition precedent to deportation by the statute," 264 U.S. at 44, this Court rejected the contention that the issue was not properly raised below (*Id.* at 45):

> "... The character of the defect is such that we cannot relieve ourselves from its consideration. The warrant lacks the finding required by the statute, and such a fundamental defect we should notice. It goes to the existence of the power on which the proceeding rests. It is suggested that if the objection had been made

> earlier, it might have been quickly remedied. There was no chance for objection afforded the petitioners until after the warrant issued, in the petition for habeas corpus. The defect may still be remedied on the objection made in this court."

Mahler involved adjudicative action by an administrative agency but, as the *Ford Motor Co.* and *McGrath* cases make clear, the same principle applies to limitations on the judicial powers of the federal courts.

II. This is an exceptional case where justice requires consideration of the issues presented in the petition.

The cases cited by Perry and the State make clear that this Court is not prohibited from considering issues not specifically argued or passed upon below. As stated in *Adickes v. Kress and Co.*, 398 U.S. 144, 147, n. 2 (1970), "where issues are neither raised before nor considered by the Court of Appeals this Court will not *ordinarily* consider them" (emphasis added). In *Adickes* the issue whether petitioner should have been allowed to amend her complaint in the District Court had little significance in view of this Court's holding that the lower courts applied improper standards of proof under the basic complaint, requiring remand for a new trial. And in *Lawn v. United States*, 355 U.S. 339, 362-363, n. 16 (1958), cited in *Adickes* and relied on by the State, the issue whether the trial court properly refused a motion during trial for production of statements was raised neither in the Court of Appeals nor in the certiorari petition. By contrast, in the present case the issues upon which Petitioner seeks review are vital questions which substantially affect the ability of Petitioner to provide the best possible educational program for its 80,000 students, which go to the essence of the decree

and which relate to the authority of a federal court to alter drastically the administration of local school systems. The case is thus more analogous to *Brotherhood of Carpenters v. United States,* 330 U.S. 395, 412 (1946), where this Court found that exceptional circumstances warranted notice of an erroneous jury charge which "was on a vital phase of the case and affected the substantial rights of the defendants." As the Court there pointed out, and as specifically provided under Rule 40(1)(d)(2), it may properly "notice a 'plain error' though it is not assigned or specified." To the same effect are *United States v. Atkinson,* 297 U.S. 157, 160 (1936) and *Washington v. Davis,* 48 L.Ed.2d 597, 606 (1976).

The Court has also held that although not passed upon by the Court of Appeals, issues raised for the first time in this Court on questions of law not calling for the examination or appraisal of evidence will be considered. *Kiefer-Stewart Company v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 214 (1951). The issues raised by Petitioner here do not challenge factual determinations below.

The errors relied on by Petitioner are fundamental and important public issues which this Court should not leave undetermined. Moreover, justice requires that the Court consider changes in facts which have supervened since the decree was entered below. *Watts, Watts & Company v. Unione Austriaca Di Navigazione,* 248 U.S. 9, 22 (1918). In the *Watts* case the Court noted that the relation of the parties to the Court had changed radically. That is also the case here. These questions are presented here by a newly constituted school board which had no prior opportunity to be heard in the District Court or Court of Appeals. See also *Ashcraft v. Tennessee,* 322 U.S. 143, 156 (1943).

III. The question of the propriety of the remedy ordered was argued in and considered by the Court of Appeals.

Petitioner has appealed each order of the District Court in this case and has urged the Court of Appeals to reverse such orders, including the present order of August 1, 1975. Of course, the issues regarding applicability of the 1974 statutory limitations on the powers of the court and the propriety of the entry of a decree without affording the affected school authorities a prior opportunity to submit plans, did not arise in this case until the District Court's judgment of August 1, 1975.

The United States urged in the Court of Appeals that the remedy ordered by the District Court went beyond its proper scope, given the facts found and the nature of the interdistrict violation. Whether, as Perry argues, the Court of Appeals could properly have disregarded such arguments on the ground that the United States was an appellee, that Court nevertheless considered the merits of the Government's contentions in its decision (Pet. A24-A25). Petitioner is likewise questioning the scope of the remedy here, on grounds similar to those urged by the United States.[1] Since the propriety of the remedy ordered was considered by the lower court, its review by this Court on the grounds urged by Petitioner presents no problem of unfairness or surprise either to the Court of Appeals or the parties.

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[1] The State's misrepresentation that Petitioner here "assert[s] that the District Court should have ordered two way transfers of students instead of the one way transfer that they did not challenge" (Brief in Opposition at p. 4) can hardly be inadvertent. Petitioner did challenge the one way transfer order in the Court of Appeals, and its petition here clearly states that it seeks full exploration of less drastic alternative remedies before such a large number of involuntary student transfers is required. Petition at 16 (n. 7), 24 (n. 13).

CONCLUSION

For the reasons stated, the arguments of Respondents that the questions presented in this petition are not open to consideration by this Court are without merit, and this Court should grant the petition upon such issues.

Respectfully submitted,

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